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Via Electronic & U.S. Mail

Ellison Folk
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Joseph Petta
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Shute, Mihaly & Weinberger LLP
396 Hayes Street
San Francisco, CA 94102-4421

Re: Alleged Use Permit and Ordinance Violations By Rotten Robbie

Dear Ms. Folk and Mr. Petta:

The City of Sebastopol (“City”) has retained our firm to represent the City’s interests with respect to your allegations concerning the Rotten Robbie gas station and car wash at 7200 Healdsburg Avenue in the City. Please copy me on any future correspondence you send to City Attorney/City Manager Larry McLaughlin regarding this matter.

The City is disappointed that your clients are still not satisfied following the City’s enforcement action against Rotten Robbie and the City-brokered mediation between the neighbors and Rotten Robbie. As your clients are aware, the City initiated a Use Permit enforcement action, partially at the urging of the neighbors, and expended considerable effort in getting both the neighbors and Rotten Robbie representatives to sit down and develop a resolution that was mutually agreeable to both sides. Following these discussions, a majority of the neighbors and Rotten Robbie agreed that Rotten Robbie would install doors on the car wash as required by the Use Permit and that this action would satisfy the concerns of the neighborhood. The installation of these doors, and the necessary accompanying lengthening of the car wash walls, have resulted in substantial reductions in the noise generated by the car wash and appear to have appeased the concerns of the majority of the neighborhood. In addition, because the lengthening of the car wash walls contributed to safety issues both on City streets and internally to the Rotten Robbie site, the City allowed Rotten Robbie to relocate a driveway to eliminate these safety issues. It is vexing that your clients now complain about the very same changes that the neighborhood asked Rotten Robbie to make in order to reduce the noise impacts in the neighborhood.

Nevertheless, City staff has reviewed your letter, dated December 23, 2014, regarding the alleged violations by Rotten Robbie of its use permit and the City's Municipal Code. After reviewing these allegations, the City has determined that they raise no new issues and the City will not to take any further action against Rotten Robbie at this time.

I. Changes Made to Rotten Robbie were a Result of the City's Enforcement Action

After receiving complaints from neighbors regarding the sound impacts of Rotten Robbie on nearby residences, the City began an enforcement action against Rotten Robbie with Mr. McLaughlin's September 10, 2012 letter. The City then entered into discussions with both Rotten Robbie and the neighbors to work on a solution that would both bring Rotten Robbie into compliance with its Use Permit and ameliorate neighborhood concerns with the continued operation of Rotten Robbie. The main concern voiced by the neighbors was the noise generated by the car wash operations. In examining the Use Permit, the City determined that the car wash had failed to install "doors" on the car wash that were necessary to reduce the sound coming from the car wash, and which were required by the Use Permit. In addition, the City set up a mediation between the neighbors, including your clients, and Rotten Robbie. Through this mediation, the majority of the neighbors and Rotten Robbie agreed to the installation of the car wash doors, and necessary lengthening of the car wash walls, as a means to reduce the noise impacts. Subsequent noise analysis of the car wash confirms that, following the installation of the doors and lengthening of the walls, the car wash operations are now in conformance with both the Use Permit and the City's noise ordinance. For these same reasons, the City no longer considers Rotten Robbie's operations to be a "public nuisance."

Since the installation of the car wash doors and the extension of the car wash walls were both required through the City's proceedings to bring the Rotten Robbie's operations into compliance with the existing Use Permit, no new Use Permit was required for those actions.

Similarly, no new Use Permit was required for the relocation of the driveway. As a result of the compliance actions described above, the length of the car wash walls caused traffic circulation and safety problems with the existing driveway and with the users of the car wash. As a result, Rotten Robbie proposed moving the driveway to avoid the traffic safety issues. The moving of the driveway also required the removal of one tree. The City reviewed these requests and determined that the moving of the driveway required a building permit and the City Arborist determined that the tree was not protected and did not require a permit for removal.

Therefore, this is not a case where changes were made to the use to allow an intensification of the use. The moving of the driveway did not allow any intensification of the use of the gas station or the car wash. Rather, the driveway relocation was made to eliminate a safety concern caused by the installation of the noise mitigation agreed to by Rotten Robbie and a majority of the neighbors. As such, *Hansen Bros. Enterprises, Inc. v. Bd. of Supervisors* (1996) 12

Cal.4th 533, and related cases concerning the intensification of legal non-conforming uses, are inapposite.

II. Rotten Robbie is a Legal Non-Conforming Use

As your letter itself notes, the Use Permit under which Rotten Robbie operates was granted in 1988, long before the current “CO” zoning was established, and is now a legal non-conforming use. As is set forth in Section 17.200.020 of the Zoning Code a “non-conforming use which is in existence on the effective date of the Zoning Ordinance, or of any subsequent rezoning or other amendment thereto which makes such use non-conforming, and which existed lawfully under the previous zoning controls may thereafter be continued and maintained *indefinitely*, and the rights to such use shall run with the land.” (Emphasis added.) Complaints from neighbors and other citizens do not, in and of themselves, remove legal non-conforming use status. (See *Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal.App.4th 1519.) Moreover, Rotten Robbie’s rights to continue operation under the long-standing Use Permit are likely “fundamental vested rights” and any attempt by the City to revoke those rights would be subject to heightened judicial scrutiny. (*Id.* at 1529 – 1531.) As such, even if the City had grounds for Use Permit revocation proceedings – which the City does not believe it has – such proceedings would be very difficult to prosecute and would not enjoy a high likelihood of success.

Your letter is correct in that the City could establish a process for amortization of legal non-conforming use. However, the Zoning Code contains no such provisions for the amortization of legal non-conforming uses. As such, even if the City Council desired to phase out Rotten Robbie over a period of time, there is no procedure in the Zoning Code to do so.

Moreover, Rotten Robbie’s status as a legal non-conforming use means that Rotten Robbie is required to comply with the terms of its Use Permit, not restrictions the Zoning Code places on new development in the CO Zoning District. Therefore, your complaints that Rotten Robbie may not be in full compliance with the “CO” requirements for new development are irrelevant to this long-standing existing use.

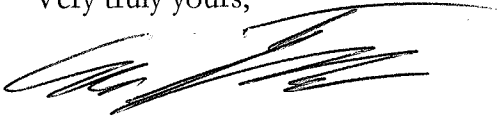
III. The Driveway Relocation was a Ministerial Approval and was not Subject to CEQA

Finally, the City strongly disagrees with your assessment that the driveway relocation, and associated tree removal, was a “project” subject to CEQA. The only required approval for the driveway relocation was a ministerial building permit. Under CEQA, ministerial approvals are not considered “projects” subject to CEQA review. (CEQA Guidelines, §§ 15060, 15063.) The tree that needed to be removed was reviewed by the City Arborist and found to not be a protected tree and, therefore, required no City approval for removal. Thus, the removal of the tree was likewise not subject to CEQA. Since none of the City’s actions are subject to CEQA, the City is not vulnerable to any liability under CEQA.

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While the City's decision not to pursue any further revocation or other enforcement proceedings against Rotten Robbie is firm, we are open to further dialogue on these issues. If you or your clients would like to discuss these issues further with Mr. McLaughlin and the City staff, please contact me and I will set up a conference call.

Very truly yours,



Edward Grutzmacher

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c: Larry McLaughlin
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